Office-Supreme Court, U.S.
FILED
AUG 5 1968
JOHN F. DAVIS, CLERK

No. 375

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

VELMA L. MENGELKOCH, MARY FAZZIO, and DEA C. KASKELA, as citizens of the United States and of the State of California, on their own behalf and on behalf of all other citizens of the State of California similarly situated,

APPELLANTS

v.

INDUSTRIAL WELFARE COMMISSION, and NORTH AMERICAN AVIATION, INC., a corporation,

APPELLEES

JURISDICTIONAL STATEMENT

MARGUERITE RAWALT
1801 16th Street, N.W.
Washington, D.C. 20009
Attorney for Appellants

INDEX

Opinions below 2
Grounds of jurisdiction 2
Statutes involved 3
Questions presented 3
Statement of the case 4
Substantiality of the questions presented 6
Appendix A ..... A-1 - A-18
Appendix B ..... B-1 - B-4

CITATIONS

Cases:

Airway Corp. v. Day, 266 U.S. 71 15
Allgeyer v. Louisiana, 165 U.S. 578 13
Baker v. Carr, 369 U.S. 186 11
Barsky v. Board of Regents, 347 U.S. 442 12
Brown v. Board of Education 347 U.S. 483 ..... 6, 11
Bowe et al. v. Colgate Palmolive Co., 272 F. Supp. 332 (S.D. Ind. 1967) 8
Bunting v. Oregon, 243 U.S. 426 15
Colgrove v. Green, 328 U.S. 549 11
Cronin v. Adams, 192 U.S. 108 10
Dixon v. AVCO (E.D. Ohio, No. 6660) 8
England v. Medical Examiners, 375 U.S. 411 18
Engineers v. Chicago Rock Island & Pacific R.R., 382 U.S. 423 ..... 16, 17
Ettelson v. Metropolitan Life Insurance Co., 317 U.S. 188 2
Florida Lime & Avocado Growers Inc. v. Jacobsen, 362 U.S. 73 ..... 3, 16
Freeman et al. v. Pacific T & T Co. (N.D. Cal., No. 49218) 8
Frost v. Corporation Commission, 278 U.S. 515 15

Glen Oaks Utility Ins. v. City of Houston, 280 F.2d 330 (CA-5, 1960) 2
Gray v. Sanders, 372 U.S. 368 3
Harper v. Virginia Bd. of Education, 383 U.S. 663 11
Hernandez v. Texas, 347 U.S. 475 14
Kesler v. Dept. of Public Safety, 369 U.S. 153 11
Levy v. Louisiana, 390 U.S. , 88 S. Ct. 1509 12
Lochner v. New York, 198 U.S. 45 15
Miller, Ex parte, 162 Cal. 687, 124 Pac. 427 . . . . . 5, 9, 10
Miller v. Wilson, 236 U.S. 373 5
Minersville School District v. Gobitas, 310 U.S. 586 11
Muller v. Oregon, 208 U.S. 412 . . . . . 5, 6, 9, 10, 15, 16
New York v. O'Neill, 359 U.S. 1 6
New State Ice Co. v. Lieberman, 285 U.S. 262 15
Orleans Parish School Board v. Bush, 242 F.2d 156, cert. denied, 354 U.S. 921 14
Plessy v. Ferguson, 163 U.S. 537 11
Richards v. Griffith Rubber Mills (D.C. Ore.) 8
Roig v. Southern Bell T. & T. Co. (E.D. La. No. 67-574) 8
R.R. Commission v. Pacific Gas Co., 302 U.S. 388 17
Singer v. Boeing Company (W.D. Wash., No. 7693) 8
Smith v. Texas, 233 U.S. 630 . . . . . 12, 15
Stell v. Savannah Chatham County Board of Education, 333 F.2d 55, certiorari denied, 379 U.S. 933 14
Sterling v. Constantin, 287 U.S. 378 17
Swift & Co. v. Wickham, 382 U.S. 111 . . . . . 11, 17
Takahashi v. Fish and Game Commission, 334 U.S. 410 . . . 12, 13
Truax v. Raich, 239 U.S. 33 12
United States v. Georgia Public Service Comm., 371 U.S. 285 . . . . . 3, 17
Urynowicz v. United Theology Center (N.D. Cal., No. 49288) 8
Ward v. Luttrell (E.D. La., No. 67-1622) 8
Weeks v. Southern Bell T. & T. Co., 277 F. Supp. 117 (S.D. Ga. 1967) 8

West Virginia State Bd. of Education v. Barnett, 319 U.S. 624 11

Wheeler v. Bohn Aluminum Brass Co. (W.D. Mich. No. 68-7) 8

White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966) 6, 16

Yick Wo v. Hopkins, 118 U.S. 356 ..... 12, 13

Zwickler v. Koota, 389 U.S. 241 18

U.S. Constitution:

Art. VI, para. 2 ..... 3, 5, 17, 18

Amendment 5 ..... 4, 17

Amendment 14 ..... 3, 4, 8, 10, 11, 12, 13, 14, 17

Amendment 19 9

Statutes:

Civil Rights Act of 1964, Title VII, 78 Stat. 241, 253, 42 U.S.C. 2000e:

§ 703(a) 2, 3, 4, 17

§ 706 ..... 4, 17, 18

§ 708 ..... 3, 4, 17

Civil Rights Act of 1964, § 1104, 78 Stat. 241, 268, 42 U.S.C. 2000h-4 ..... 3, 4

California Labor Code:

§ 1350 ..... 2, 3, 4, 17

§ 1350.5 ..... B-1

§ 1357 ..... B-2

28 U.S.C. 1253 3

28 U.S.C. 2201 ..... 2, 4

28 U.S.C. 2202 ..... 2, 4

28 U.S.C. 2281 ..... 2, 5

28 U.S.C. 2284 ..... 2, 5

Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U.S.C. 201 et seq. 9

Miscellaneous:

H. Rept. No. 914, Part 2, 88th Cong., 1st Sess. (1963) 7

110 Cong. Rec. 2580, 2577-8, 2732 (1964) 7

Executive Order No. 10980, Dec. 1961 8

U.S. Dept. of Labor, "Monthly Statistics on the Woman Labor Force," (June, 1968) 8

U.S. Dept. of Labor, "Fact Sheet on the American Family in Poverty," April, 1968 9

U.S. Dept. of Commerce, Bureau of the Census: CPR-60, No. 53 9

American Women, Report of the President's Commission on the Status of Women, GPO 1963 8

Murray and Eastwood, "Jane Crow and the Law: Sex Discrimination and Title VII," 34 G.W. Law Rev. 232 (1965) 16

Stern and Gressman, *Supreme Court Practice* (3rd ed., 1962) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No.

VELMA L. MENGELKOCH, MARY FAZZIO, and DEA C. KASKELA, as citizens of the United States and of the State of California, on their own behalf and on behalf of all other citizens of the State of California similarly situated,

APPELLANTS

v.

INDUSTRIAL WELFARE COMMISSION, and NORTH AMERICAN AVIATION, INC., a corporation,

APPELLEES

JURISDICTIONAL STATEMENT

Appellant Velma L. Mengelkoch appeals from the judgments of the United States District Court for the Central District of California entered on May 10, 1968, refusing to declare invalid and to enjoin enforcement of section 1350 of the California Labor Code, as requested in appellants' complaint, and also refusing to adjudicate appellants' cause of action under Title VII of the Civil Rights Act of 1964 (78 Stat. 241, 253, 42 U.S.C. 2000e). Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The court below rendered two opinions, one sitting as a three-judge court and the other sitting as a single-judge court. Neither opinion is officially reported but they may be found in 68 L.R.R.M. 2273 and 68 L.R.R.M. 2277, respectively. A copy of each opinion is attached hereto as Appendix A.

GROUNDS OF JURISDICTION

This action was brought as a class action under both Title VII of the Civil Rights Act of 1964 and 28 U.S.C. 2201 and 2202, (1) to declare invalid and enjoin enforcement of section 1350 of the California Labor Code, which restricts the hours of work for women but not for men, and (2) to enjoin defendant North American Aviation, Inc., from discriminating against appellant and other women employees because of their sex in violation of section 703(a) of the Civil Rights Act of 1964, 78 Stat. 241, 255.

A three-judge court, convened pursuant to 28 U.S.C. 2281, 2284, entered a final judgment denying the relief requested by granting the motion to dismiss of defendants Division of Industrial Welfare and Industrial Welfare Commission and dissolving itself. On the same day, the single judge assumed jurisdiction and dismissed the case. By dissolving itself as a three-judge court after decision of the constitutional issue on its merits, the three-judge court denied the injunction and dismissed the case as effectively as if it had used the words "injunction denied." See *Glen Oaks Utility, Inc. v. City of Houston*, 280 F.2d 330, 333 (C.A. 5, 1960); *Ettelson v. Metropolitan Life Insurance Co.*, 317 U.S. 188, 192.[1]

The judgment of the District Court was entered May 10, 1968, and notice of appeal to this Court was filed June 7,

[1] See Stern & Gressman, *Supreme Court Practice* (3rd Ed., 1962), page 164, which states that the court is "deciding a case on the merits when it dismisses for want of a *substantial* question."

1968.[2] The jurisdiction of the Supreme Court to review the decision below by direct appeal is conferred by 28 U.S.C. 1253. *Gray v. Sanders*, 372 U.S. 368, 370, 379; *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73; *United States v. Georgia Public Service Commission*, 371 U.S. 285, 287.

STATUTES INVOLVED

The text of section 1350 of the California Labor Code, and the applicable sections of the Civil Rights Act of 1964, are set forth in Appendix B.

QUESTIONS PRESENTED

1. Whether section 1350 of the California Labor Code, which discriminates against female persons in employment opportunities, job advancements, and opportunities to earn overtime compensation, by restricting the hours of labor of such female persons, but not the hours of labor of male persons, is violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution so as to have required the issuance of an injunction by the three-judge court.

2. Whether section 1350 of the California Labor Code, which denies equal employment opportunities to women by requiring and permitting that they be discriminated against in employment on the basis of sex, was nullified and superseded by sections 703(a), 708 and 1104 of the Civil Rights Act of 1964 (78 Stat. 241, 253) by virtue of the Supremacy Clause of the United States Constitution, Article VI, Para. 2, inasmuch as the said state statute directly conflicts with the federal statute and has the effect of perpetuating invidious discriminations against women in employment, this being the very evil which the federal statute was designed to remedy.

---

[2] A precautionary notice of appeal to the United States Court of Appeals for the Ninth Circuit was filed in the court below on June 10, 1968.

3. Whether section 703(a) of the Civil Rights Act of 1964, which prohibits employers subject to it, including defendant North American Aviation, Inc., from discriminating against employees or applicants for employment because of sex, required the District Court to grant the relief requested under section 706 of the Civil Rights Act of 1964 and 28 U.S.C. 2201, 2202, rather than relegating plaintiffs to the state courts of California which have no jurisdiction to entertain a suit under the Civil Rights Act of 1964.

4. Whether the District Court's dismissal of this action deprived the plaintiffs and other women similarly situated of their rights under the Due Process Clause of the Fifth Amendment of the United States Constitution to seek redress in the courts of the United States for alleged violation of their rights under the Constitution and laws of the United States, specifically the Fourteenth Amendment, and 28 U.S.C. 2201, 2202, and sections 703(a), 706, 708, and 1104 of the Civil Rights Act of 1964.

STATEMENT OF THE CASE

This case involves the validity of a California statute restricting the working hours of women solely because of their sex, which thus denies them employment in many occupations, as well as opportunities for promotions and for earning overtime pay.

The plaintiffs below, Mrs. Velma L. Mengelkoch, Mrs. Mary Fazzio, and Mrs. Dea Kaskela, are employed as assemblers by the defendant, North American Aviation, Inc. They brought this suit on behalf of themselves and other working women similarly situated for the twofold purpose of (1) enjoining the California State Industrial Welfare Commission and Division of Industrial Welfare from enforcing Section 1350 of the California Labor Code on the ground that this section requires an employer to discriminate against plaintiffs on the basis of their sex contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States; and (2) restraining North American Aviation, Inc. from any further violations of Section 703(a) of the Civil

Rights Act of 1964. The complaint also asked the court to "retain jurisdiction until such time as the defendants herein have shown compliance with the injunctive relief granted," and for "such other and further declaratory decrees as may be proper in the premises."

After the complaint was filed, a three-judge court was convened as required by 28 U.S.C. 2281, 2284. The California Industrial Welfare Commission then moved to dismiss the action. The motion to dismiss was heard by the three-judge court on April 18, 1967. More than a year later, on May 10, 1968, the District Court held that the constitutional issue was not substantial and dissolved itself as a three-judge court, thereby denying injunctive and all other relief sought by the plaintiffs. The three-judge court's opinion and order denying the injunction gives three bases: (1) the constitutional question is insubstantial because special restrictions on hours of labor for women only had been upheld by the California courts in *Ex Parte Miller,* 162 Cal. 687, 124 Pac. 427 (1912), and by the United States Supreme Court in two cases decided more than a half-century ago: *Muller v. Oregon,* 208 U.S. 412 (1908); *Miller v. Wilson,* 236 U.S. 373 (1915); (2) the Supremacy Clause of the Constitution does not furnish a basis for three-judge court jurisdiction; and (3) under the Civil Rights Act of 1964, only the Attorney General of the United States may invoke three-judge court jurisdiction.

On the same day that the three-judge court denied plaintiffs' request for relief, the single-judge court invoked the abstention doctrine and dismissed the case for the stated purpose of giving the California courts another chance to interpret its law restricting employment opportunities for women. The single judge said "[t]his disposes of all matters pending in this case." (App. A, page A-18) Obviously, the court ignored the Civil Rights Act question, for only the Federal Courts, not the State courts, have jurisdiction over actions under the Civil Rights Act of 1964. The single-judge court, overlooking 28 U.S.C. 1253, stated that plaintiffs'

"objective of a direct appeal to the Supreme Court on the merits is not attainable because a three-judge court has been found to be inappropriate and has been dissolved." (App. A, p. A-12.)

SUBSTANTIALITY OF QUESTIONS PRESENTED

This appeal raises constitutional issues which are so substantial and of such great magnitude as to require plenary consideration by this Court with briefs on the merits and oral argument. The issues are of importance to 35 percent of the Nation's work force and to 51 percent of its population who are women. While neither the Attorney General nor the Equal Employment Opportunity Commission has seen fit to participate in this case, the issues are of great importance to the administration and enforcement of Title VII of the Civil Rights Act of 1964. The importance of the issues presented is thus "enormous" (App. A, p. A-17). The court below recognized this (*ibid.*), and its statement that the issues are not substantial rests entirely on its view that they had been settled by this Court's decision in *Muller v. Oregon*, 208 U.S. 412 (1908). The *Muller* decision, we submit, is anachronistic and plainly distinguishable from the instant case. We shall also show that the decision below ignores this Court's numerous civil rights decisions as well as its decisions holding that the right to earn a living is a fundamental right of all persons. In addition, the decision below is in conflict with the rationale of the three-judge court decision in *White v. Crook*, 251 F. Supp. 401 (M.D. Ala., 1966).

1. Not since *Brown v. Board of Education*, 347 U.S. 483 (1954), has a case raised more substantial constitutional issues than does the instant case. Since California and at least 40 other jurisdictions have restrictive labor laws which apply to women only, the constitutionality of these restrictive laws is sufficiently important to warrant review by this Court. See *New York v. O'Neill*, 359 U.S. 1, 3. Moreover, in sustaining these restrictive laws and in refusing to hold

that they have been superseded by the Civil Rights Act of 1964, the court below has practically nullified the protection against sex discrimination which Congress sought to give working women. The legislative history shows that protection against sex discrimination was included in the Civil Rights Act because Congress recognized that women, regardless of race, were subjected to invidious employment discrimination comparable to those inflicted upon racial minorities.[3]

The legislative history further shows that Congress recognized that the so-called "protective" laws of the States limiting employment opportunities for women, have become a major cause of discrimination against working women. Both the proponents and the opponents of the sex amendment of Title VII believed that it would supersede the application of state restrictive laws, and it was the intent of Congress to free women from such legislative restrictions.[4] The decision below ignores this legislative intent and has the effect of judicially repealing and nullifying the very purpose of the sex discrimination provisions of the Civil Rights Act. Under the decision below, all an employer has to do to evade the Federal law is to point to the state law requiring special treatment for women employees.

The importance of the issues presently before this Court is demonstrated by the volume of litigation now pending in federal courts in which women workers seek to invoke the

---

[3]See H. Rept. No. 914, part 2, 88th Cong., 1st Sess. (1963), additional views of Congressmen McCulloch, Lindsay, Cahill, Shriver, MacGregor, Mathias, and Bromwell, which cites statistics of the Bureau of the Census showing that in 1960 the median wage in the United States was for white men–$5137, for nonwhite men–$3075, for white women–$2537, and for nonwhite women–$1276.

[4]Congresswomen Martha Griffiths and Catherine St. George, who favored equal employment opportunities for women, and Congressmen Emanuel Celler and Abraham Multer who were opposed, agreed that the effect of the sex discrimination amendment would be to supersede state laws regulating employment on the basis of sex. 110 Cong. Rec. 2580, 2577-8, 2732 (1964).

protection of the 14th Amendment or the Civil Rights Act or both. See *e.g., Ward v. Luttrell* (No. 67-1622, E.D. La.); *Roig v. Southern Bell T. & T. Co.* (No. 67-574, E.D. La.); *Weeks v. Southern Bell T. & T. Co.*, 277 F. Supp. 117 (S.D. Ga., 1967), now on appeal to the 5th Circuit; *Dixon v. AVCO* (No. 6660, E.D. Ohio); *Wheeler et al. v. Bohn Aluminum and Brass Co.* (No. 68-7, W.D. Mich.). See also, *Bowe v. Colgate-Palmolive Co.*, 272 F. Supp. 332 (S.D. Ind., 1967), now on appeal to the 7th Circuit; *Urynowicz v. United Technology Center* (No. 49288, N.D. Cal.); *Freeman et al. v. Pacific T. & T. Co.* (No. 49218, N.D. Cal.); *Richards v. Griffith Rubber Mills* (D.C. Ore.); *Singer v. Boeing Co.* (No. 7693, W.D. Wash.).

In its 1963 report, the President's Commission on the Status of Women[5] stated that it was,

> "convinced that the U.S. Constitution now embodies equality of rights for men and women * * *. But judicial clarification is imperative in order that remaining ambiguities with respect to the constitutional protection of women's rights be eliminated. Early and definitive court pronouncement, particularly by the U.S. Supreme Court, is urgently needed with regard to the validity under the 5th and 14th amendments of laws and official practices discriminating against women, to the end that the principle of equality become firmly established in constitutional doctrine." *American Women*, page 45 (GPO, 1963).

Forty-eight percent of the women between ages 18 and 64 are in the labor force.[6] Eleven percent of American families are headed by women; 35% of these families live in poverty; 61% of the Nation's poor children live in families

---

[5]Established by Exec. Order No. 10980, Dec. 1961, the Commission consisted of the Secretary of Labor, the Attorney General, other cabinet officers, and several public members.

[6]U.S. Dept. of Labor, "Monthly Statistics on the Woman Labor Force," data for May, 1968 (June 1968).

headed by women.[7] The median earnings of year-round full-time women workers in 1966 was only about 60% of that of men.[8] Nonwhite women with a high school education earn only slightly more ($2475) than nonwhite men with less than an eighth grade education ($2376), and considerably less than white men with less than 8 years schooling ($2945). White women with some college earn less ($3519) than men with an eighth grade education ($3681 for nonwhite men, $4611 for white men), and less than nonwhite women with some college ($3964).[9] More than one-third of the cases filed with the Equal Employment Opportunity Commission during its first year alleged discrimination because of *sex*.

2. The court below stated that the constitutional issue was insubstantial for the sole and simple reason that over sixty years ago this Court had upheld the convictions of employers who had violated state hours laws by employing women for periods prohibited by such statutes. *Muller v. Oregon, supra; Ex Parte Miller, supra.* The threshold question of whether a three-judge court was required was never challenged. The Nineteenth Amendment, the greatly increased participation of women in the work force, smaller families, longer lifespan, more modern medical knowledge, greater union membership, greater protection of workers of both sexes against excessive hours of work under the Federal Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, state premium pay laws, and most important, the promise of protection against employment discrimination under the Civil Rights Act of 1964, are among the many factors which render virtually irrelevant the considerations in those cases which caused this Court to uphold these convictions.

---

[7]U.S. Dept. of Labor, "Fact Sheet on the American Family in Poverty," April, 1968.

[8]U.S. Dept. of Commerce, Bureau of the Census: CPR-60, No. 53.

[9]*Ibid.*

Since the decision in *Muller* mechanization of industrial processes and automation have made any difference in strength or endurance between men generally and women generally irrelevant in employment. In the days of *Muller*, women had no political rights and only the poorest and most disadvantaged engaged in employment outside the home. Under these circumstances they could be easy victims of unscrupulous employers. The woman who had no father, no husband, or no brother to support her was regarded as helpless as a minor child. While this Court's decision in *Muller* is of historical significance and was motivated by humanitarian considerations relevant to economic conditions then existing, it is anachronistic as a judicial precedent in today's economy. The conditions of working women as they were at that time do not now exist, and today equal opportunity and freedom from restrictions for women as well as for racial, ethnic or religious groups is recognized as a part of human rights.

Moreover, *Muller v. Oregon*, 208 U.S. 412 (1908), *Miller v. Wilson*, 236 U.S. 373 (1915) and *Ex Parte Miller*, 162 Cal. 687, 124 Pac. 427 (1912), are not in point because both the fact situations and the legal issue differed from that presented here. In those cases, the Court was not directly presented with the question of whether the Due Process and Equal Protection Clauses protected *women* in their right to follow legitimate occupations. None of those cases were brought by a woman who was claiming that her due process and equal protection rights had been invaded by state restrictive labor laws. Those cases involved employers who had been subjected to fines under criminal statutes for employing women for periods longer than the state statutes prescribed. The issue was whether the employers' right of freedom to contract had been invaded by such restrictions, and the Court held that it had not. The defendants, who were men employers rather than women employees, could not properly raise the issue of unconstitutional discrimination on the ground of sex. See, *e.g.*, *Cronin v. Adams*, 192 U.S. 108 (1904), in which this Court ruled that the plain-

tiff, a male saloon operator, had no standing to raise the issue of whether an ordinance was unconstitutional because it restricted the activities of women since the plaintiff was "not a female nor delegated to champion any grievance females may have under the ordinance."

That the protection of women in their freedom to pursue gainful occupations may not have been a prime motivation for the adoption of the Fourteenth Amendment is not relevant in determining their rights to its protection. The situation presented here is somewhat similar to that presented in *Brown v. Board of Education* (1954) 347 U.S. 483. It was there contended that at the time of the adoption of the Fourteenth Amendment, there was no intention to protect a Negro child's right to attend integrated schools. This Court rejected the argument, pointing out that the Constitution must be applied in light of the social and economic factors in modern society rather than by a study of the customs of the 1860's. As this Court summed it up in *Harper v. Virginia Board of Education*, 383 U.S. 663, 669 (1966):

> "In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. * * * Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change."

Certainly, the dicta in cases decided more than a half century ago do not render future challenges forever insubstantial. Compare: *Plessy v. Ferguson*, 163 U.S. 537 (1896), with *Brown v. Board of Education*, 347 U.S. 483 (1954); *Colgrove v. Green*, 328 U.S. 549 (1946) with *Baker v. Carr*, 369 U.S. 186 (1962); *Minersville School Dist. v. Gobitus*, 310 U.S. 586 (1940) with *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Kesler v. Dept. of Public Safety*, 369 U.S. 153 (1962) with *Swift & Co. v. Wickham*, 382 U.S. 111 (1965).

3. The holding below that women are not "persons" under the Fourteenth Amendment and that they are not entitled to the guarantees of Due Process and Equal Protection available to men is contrary to numerous decisions of this Court. The right to earn a living unhampered by legislative and governmental restraints is one of the most valuable rights protected by the Constitution. As Justice Douglas pointed out in *Barsky v. Board of Regents*, 347 U.S. 442, 472:[10]

> "The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property * * * It does many men little good to stay alive and free and propertied if they cannot work. To work means to eat. It also means to live."

Plainly, women "are not 'non-persons'. They are humans * * * [and] clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." See *Levy v. Louisiana*, 390 U.S. __, 88 S. Ct. 1509, 1510-11. Women are "persons" under the Fourteenth Amendment, and state laws cannot deprive them of the right "to work", "to eat", and "to live."

Accordingly, women may not be deprived of liberty or property without due process of law. This Court has repeatedly held that the right to engage in legitimate occupations is protected by the Due Process Clause. *Takahashi v. Fish and Game Commission*, 334 U.S. 410; *Truax v. Raich*, 239 U.S. 33; *Smith v. Texas*, 233 U.S. 630; *Yick Wo v. Hopkins*, 118 U.S. 356. It is "fundamental" to the right "to life, liberty, and the pursuit of hapiness." *Yick Wo*, *supra*, at 370. Being both a "liberty" and a "property" right, it is constitutionally protected, not only from confiscation by legislative edict, but also from any unjustifiable impairment

---

[10] The quotation is from the dissenting opinion of Justice Douglas. The case itself is not in point as it involved a question of whether persons could be banned from certain types of employment in the public interest because of moral unfitness. See discussion, *infra* pages 13-14.

or abridgment. *Yick Wo v. Hopkins, supra; Allgeyer v. Louisiana,* 165 U.S. 578, 589-90. In *Yick Wo,* this Court emphasized the importance of this constitutional right by stating: "[T]he very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." (118 U.S. at 370.)

Since the right to earn a living is an inalienable right and one of the most valuable ones protected by the Due Process Clause, this right cannot be taken away from a person by the legislature, not even under the guise of conferring some benefits on some other persons. In concluding that the state legislature could deprive the plaintiffs of their inalienable right to earn their livelihoods on the assumption that *some* women wish to have such limitations imposed on them, the decision below is in direct conflict with the above decisions of this Court. See *Takahashi v. Fish and Game Commission, supra,* 334 U.S. 410, 418-19, wherein this Court emphasized that a Japanese alien could not be deprived by statute of the right to engage in the occupation of fisherman even though such deprivation would benefit United States citizens by eliminating competition.

This is not a case in which this Court must decide whether it is better to restrict women who wish to work long hours and compete with men, for the benefit of men and other women, who do not wish to do so. The inalienable right of a woman to earn a livelihood cannot be bartered away by a State for the purpose of giving preferential treatment to some other person or persons.

Appellants do not contend that the Fourteenth Amendment would prevent the States from passing laws to protect the public by prohibiting persons who lack the necessary skill or competence from engaging in occupations which require such abilities, or by prohibiting persons of proven moral incapacity from engaging in certain occupations.

Appellants also recognize that it would be constitutional for a State to pass laws which protect the health and safety of *all* persons in certain employments against special hazards that are inherent in such employments. We do contend that the Fourteenth Amendment prevents a State legislature from making generalizations that *all* women are physically inferior to *all* men and from passing laws to prevent *all* women from engaging in certain occupations on the basis of that assumption. Many women are physically stronger and have more physical endurance than many men. As individuals these women cannot be deprived of liberty and property without due process nor can they be denied the equal protection of the law. See *Stell v. Savannah Chatham County Board of Education*, 333 F.2d 55, 61-62, certiorari denied, 379 U.S. 933; and *Orleans Parish School Board v. Bush*, 242 F.2d 156, 163, certiorari denied, 354 U.S. 921, wherein the Fifth Circuit held that Negro children could not be deprived by a State government of their right to attend integrated schools on the assumption that Negro children as a group are academically inferior to white children as a group.

4. The State statute here involved is also unconstitutional because it denies rights guaranteed by the Equal Protection Clause. It does this by making an arbitrary classification on the basis of sex, thus subjecting an identifiable group of persons to invidious discrimination in one of the freedoms most vital to human existence. As the Court observed in *Hernandez v. Texas*, 347 U.S. 475, 478, "Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for treatment not based on some reasonable classification, the guarantees of the Consti-

tution have been violated." See also *Frost v. Corporation Commission,* 278 U.S. 515, 522; *Airway Corporation v. Day,* 266 U.S. 71, 85.

It is common knowledge that women, throughout our history, have been singled out for unequal treatment, not only in the payment of wages, but also in the number of hours which they may work in private callings, and this despite the Court's admonition that while a "State may legislate so as to exclude from work in such private calling those whose competence might cause injury to the public, * * * the tests and prohibitions should be enacted reference to that object and so as not unduly 'to interfere with private business, or impose unusual and unreasonable restrictions upon lawful occupations'" (*Smith v. Texas,* 233 U.S. at 636; *New State Ice Co. v. Liebmann,* 285 U.S. 262, 278). California's "Jane Crow" law, we submit, does not meet the tests. Not only does it "interfere with private business," but it also "imposes unusual and unreasonable restrictions upon lawful occupations." Plaintiffs are competent women workers, and their employment in the jobs which they seek would cause no "injury to the public."

Nor can California's "Jane Crow" law be upheld on the theory that it prevents the exploitation of women workers. At the time of *Muller v. Oregon,* the Court recognized the disadvantaged and dependent position of a woman in the economy, and it based its decision, in part, on the view that "legislation to protect her seems necessary to secure a real equality of right" (208 U.S. at 422). Moreover, the *Muller* approval of sex as a basis for legislative classification made it possible to uphold labor standards legislation in spite of the ruling in *Lochner v. New York,* 198 U.S. 45 (1905) that a restrictive hours law as applied to bakery employees, including men, was unconstitutional. Today the situation is turned around: laws which treat women workers differently than men workers *deny* "equality of right" to women. Also, hours legislation for both sexes was upheld in 1917 in *Bunting v. Oregon,* 243 U.S. 426, so that the doctrine of

special treatment for women no longer need be used in order to sustain the constitutionality of State labor standards legislation. It has been pointed out that judicial approval of laws classifying persons by sex "totally defeats the meaning of equal protection of the laws for women," and suggested that "just as separate schools for Negro and white children by their very nature cannot be 'equal,' employment classification on the basis of sex is today inherently unreasonable and discriminatory." Murray and Eastwood, "Jane Crow and the Law: Sex Discrimination and Title VII," 34 G.W. Law Rev. 232, 237, 250 (1965).

The doctrine of special treatment for women, like the misguided doctrine of "separate but equal" treatment for Negroes, must now be discarded. And this is exactly what the three-judge court did in *White v. Crook*, 251 F. Supp. 401 (M.D. Ala., 1966). There, in striking Alabama's law which excluded women from jury service, the court said:

> "The argument that the 14th Amendment was not intended to require the states to make women eligible for jury service reflects a misconception of the function of the Constitution and this Court's obligation in interpreting it. The Constitution of the United States must be read as embodying general principles meant to govern society and the institutions of government as they evolve through time. It is therefore this Court's function to apply the Constitution as a living document to the legal cases and controversies of contemporary society."

While the court below recognized that today's woman "is man's equal and to be accorded the same rights and privileges as her male counterpart" (App. A, p. A-7), it refused to apply the above principles and relied instead on the ancient rationale of *Muller v. Oregon, supra*.

5. Since the three-judge court in this case was properly convened, it had jurisdiction to dispose of all questions, including non-constitutional ones. *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73; *Engineers v. Chicago, R.I. & P.R. Co.*, 382 U.S. 423, 428; *United States v.*

Georgia Public Service Commission, 371 U.S. 285, 287; *Sterling v. Constantin*, 287 U.S. 378, 393-94; *Railroad Commission v. Pacific Gas Co.*, 302 U.S. 388, 391.

Swift & Co. v. Wickham, 382 U.S. 111, relied on by the court below, is not applicable. In that case, there was no substantial constitutional issue—simply a conflict between state and federal law. The case of *Engineers v. Chicago, R.I. & P.R. Co., supra*, decided after *Swift Co. v. Wickham*, points out this distinction. As there are substantial constitutional issues in this case under the Due Process and Equal Protection Clauses of the Fourteenth Amendment which the three-judge court decided on the merits, it should have decided as well the following non-constitutional questions: (1) whether Title VII of the Civil Rights Act superseded Section 1350 of the California Labor Code by virtue of the Supremacy Clause of the Constitution, Article VI, par. 2, and Section 708 of the Civil Rights Act of 1964; and (2) whether the plaintiffs were entitled to the relief requested under that Act.

There is no question from the express phraseology of Section 708 of the Civil Rights Act and from its legislative history discussed above that it was the intent of Congress to nullify state laws which have the effect of discriminating against persons in employment on the basis of sex.

6. The District Court (sitting as a three-judge court and also as a single-judge court) denied plaintiffs due process of law. Thus, on May 10, 1968, the three-judge court (speaking through Judge Stephens) decided the case against plaintiffs on the 14th Amendment issue without considering the Supremacy Clause question or the Title VII issue, which is intimately entwined with and dependent upon the 14th Amendment issue. On the very same day, Judge Stephens (sitting as a single-judge court) also refused to pass on the Supremacy Clause issue, invoking (erroneously, we submit) the abstention doctrine, and then dismissed the case in its entirety. Plaintiffs were thus relegated to the State courts for a resolution of their cause of action under Title VII of

the Civil Rights Act, as well as a resolution of the Supremacy Clause issue, and this despite the fact that under Section 706(f) State courts have no jurisdiction to entertain a suit under Title VII of the Civil Rights Act.

The single judge misapplied the abstention doctrine. While this doctrine is available when the state statute is of an uncertain nature, the unconstitutional aspect of the California statute is clear; it provides for different treatment of workers based on sex, and the amendment enacted after the institution of this action retains the sex distinction and in no way alters the issue. *Zwickler v. Koota,* 389 U.S. 241, 249, 251. This Court has said repeatedly that a federal court cannot use the abstention doctrine so as to "abdicate" from exercising its proper jurisdiction. *England v. Medical Examiners,* 375 U.S. 411, 416. Nor can it force a litigant into a state court against his will. *Id.* at 415. The instant case is an example of abdication of judicial responsibility both by the three-judge court and the single-judge court.

Appellant submits that this appeal brings before the Court substantial federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

MARGUERITE RAWALT
General Counsel, National Organization for Women
1801 Sixteenth Street, N. W.
Washington, D. C. 20009

PROOF OF SERVICE

I, Marguerite Rawalt, the attorney for Velma L. Mengelkoch, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the day of August, 1968, I served copies of the foregoing Jurisdictional Statement on the several parties thereto, as follows:

1. On Mary Fazzio and Dea C. Kaskela, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorney Phill Silver, Esq., 1680 North Vine Street, Hollywood, California 90028.

2. On the Industrial Welfare Commission and Division of Industrial Welfare of the State of California, and on North American Aviation, Inc., by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record as follows:

To: Thomas Lynch, Esq., Attorney General of the State of California, Sacramento, California

To: William Zessar, Esq., Deputy Attorney General of the State of California, 600 State Building, 217 West First Street, Los Angeles, California 90012

To: B. Franklin Walker, Esq., Deputy Attorney General of the State of California, 350 McAllister Street, Room 6000, San Francisco, California.

To: Stephen E. Tallent, Esq., Attorney for North American Aviation, Inc., Gibson, Dunn and Crutcher, 643 South Spring Street, Los Angeles, California 90014

Marguerite Rawalt
Attorney for Appellant,
Velma L. Mengelkoch
1801 16th Street, N. W.
Washington, D. C. 20009

APPENDIX A

[Filed May 10, 1968]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VELMA L. MENGELKOCH, MARY FAZZIO, and DEA C. KASKELA, as citizens of the United States and of the State of California, on their own behalf and on behalf of all other citizens of the State of California similarly situated,

Plaintiffs,

vs. Civil No. 66-1618-S

INDUSTRIAL WELFARE COMMISSION, NORTH AMERICAN AVIATION, INC., a corporation,

Defendants.

OPINION AND ORDER ON MOTION TO DISSOLVE THREE-JUDGE COURT

Before: JERTBERG, Circuit Judge, and
STEPHENS and GRAY, District Judges

STEPHENS, District Judge

This is an action brought for declaratory and other appropriate relief pursuant to the Civil Rights Act of 1964. Plaintiffs originally appeared by their counsel, Phill Silver & Philip Poppler. Subsequently, Evelyn E. Whitlow was substituted as counsel for plaintiff Velma L. Mengelkoch. Defendants Industrial Welfare Commission and Division of Industrial Welfare appear by their counsel Thomas C. Lynch, Attorney General, B. Franklin Walker, Jr. and William L. Zessar, Deputies Attorney General. Defendant North American Aviation, Inc. appears by its counsel Gibson, Dunn & Crutcher.

Plaintiffs, three female employees of defendant North American Aviation, Inc., are suing to have Section 1350 of the California Labor Code (a maximum hours for women law), declared unconstitutional as violating the Equal Protection Clause of the 14th Amendment to the Constitution of the United States, or invalid as conflicting with Title VII of the Civil Rights Act of 1964 [24 U.S.C. § 2000(e)-7]. Plaintiffs, suing in their own behalf and purportedly in behalf of all similarly situated women in the State of California, seek to enjoin defendants California Industrial Welfare Commission and the California Division of Industrial Welfare from enforcing § 1350, C.L.C., and to enjoin defendant North American from further violations of Title VII of the Civil Rights Act.

Plaintiffs requested that a three-judge court be convened to hear and determine the case pursuant to Title 18 U.S.C. § 2281 and § 2284. A three-judge court was appointed and convened. Defendants Division of Industrial Welfare and the Industrial Welfare Commission filed a motion to dismiss.[1] Defendants' motion seeks three separate kinds of relief: (1) to dissolve the three-judge court; (2) to dismiss the complaint as against them on the ground that, as state agencies, they are immune from suit; and (3) to dismiss the action on the ground that the court, in the exercise of its discretion, should abstain from adjudicating the merits of this case.

STATEMENT OF THE ISSUES

The ultimate merits of plaintiffs' claims are not now before the court. Nevertheless, it is appropriate to briefly mention the substance of the laws in issue. Section 1350 of the California Labor Code prohibits the working of females in certain employments for more than eight hours a day or forty-eight hours a week. Since the institution of this action, this

---

[1] Defendant North American has not joined in the motion to dismiss. A stipulation has been entered into giving North American time to plead after the disposition of the motion to dismiss.

section was amended to provide an exception to its terms pursuant to section numbered 1350.5 which was added in 1967. Where applicable this new section authorizes the employment of women up to ten hours per day and provides for overtime pay. In 1967 a new section numbered 1357 was added.

There are two distinct issues, one relating to the Equal Protection Clause and the other to Title VII of the Civil Rights Act of 1964.

Issue No. 1

Section 1350 is said to violate the Equal Protection Clause of the 14th Amendment. In general, the Equal Protection Clause prohibits unreasonable classifications in state laws, including classifications based upon sex. The question is one of the reasonableness of the classification made in the state regulatory statute.

Issue No. 2

Section 1350 is said to be in conflict with Title VII of the Civil Rights Act of 1964. The Supremacy Clause of the Constitution dictates that a state statute which conflicts with a valid federal statute cannot stand. The federal statute, Title VII, prohibits an employer from discriminating against an employee with respect to compensation, terms, conditions, or privileges of employment based upon, inter alia, that employee's sex. It also prohibits an employer from limiting, segregating or classifying his employees in any way which would deprive them of employment opportunities or otherwise adversely affect their status as employees because of their sex. 42 U.S.C. § 2000 (e)-2(a). There is no "savings clause" for state protective laws for women in Title VII. However, Title VII does provide that an employer does not have to comply with a state statute requiring him to do acts which Title VII makes unlawful.

Plaintiffs claim that a state law which forbids an employer from allowing women to work overtime at premium

pay compels discrimination with respect to compensation and privileges of employment by reason of their sex. The question is whether the state law conflicts or is inconsistent with the federal law. If it does, the federal law prevails.[2]

PROPRIETY OF A THREE-JUDGE COURT.

Section 2281 provides for a three-judge court where an injunction is sought restraining the enforcement of a state statute upon the ground that it is unconstitutional. Section 2281 provides:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement, or execution of such statute or any order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof *upon the ground of unconstitutionality of such statute* unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." (Italics supplied.)

A. *Substantial Constitutional Issue*

It has been consistently held that a *substantial* constitutional question must be raised in order to invoke a three-judge court. *California Water Service Co. v. City of Redding*, 304 U.S. 252 (1938). Lack of substantiality of the constitutional issue may exist because prior Supreme

---

[2]There is a time-honored rule of constitutional adjudication that the court will not pass upon a constitutional question if there is some other ground upon which the case may be disposed of. In other words, the court will not reach the merits of the constitutional issue when a decision on some lesser ground renders it unnecessary. *Kent vs. Dulles*, 357 U.S. 116 at 129 (1958); *Ashwander vs. TVA*, 297 U.S. 288 at 347 (1936). Accordingly, the court should pass upon the merits of the federal-state conflict issue before reaching the Equal Protection issue. If it is held that the state law is in conflict with the federal law, it will be unnecessary to pass upon the Equal Protection issue. *Boynton vs. Virginia*, 364 U.S. 454, 457 (1960).

Court decisions make clear that it is without merit. *California Water Service Co. v. City of Redding, supra; German v. South Carolina State Ports Authority,* 295 F.2d 491 (5th Cir., 1961); *People of State of Ill. ex. rel. Sankstone v. Jarecki,* 116 F.Supp. 422 (D.C. Ill., 1953); appeal dismissed 346 U.S. 861; *Bradley v. Waterfront Commission of New York Harbor,* 130 F.Supp. 303 (D.C. N.Y., 1955); *Blass v. Weigel,* 85 F.Supp. 775 (D.C. N.J., 1949). The insubstantiality is especially apparent when previous decisions of the Supreme Court have specifically upheld the state statute in question against attack on constitutional grounds. *German v. South Carolina State Ports Authority, supra.*

The first issue raised by plaintiffs is that Section 1350 is unconstitutional as a denial of "equal protection of the laws." (See, Complaint ¶ XXIV) The constitutionality of Section 1350[3] was challenged in *The Matter of Application of Miller,* 162 Cal. 687, 124 P. 427 (1912) and *Miller v. Wilson,* 35 S.Ct. 342 (1915) as a deprivation of liberty to contract and a denial of equal protection. The Supreme Court held that the California statute was constitutional. The statute was found to be a reasonable regulation by the state to safeguard the public health. In so holding, the court regarded its prior decisions upholding other state maximum hours for women laws as decisive.

In *Miller,* the court quoted at length from the landmark case, *Muller v. Oregon,* 28 S.Ct. 324, 208 U.S. 412 (1908), the first Supreme Court case to uphold the constitutionality of a state maximum hours law. Cf. *Lochner v. New York,* 198 U.S. 45, 25 S.Ct. 539 (1905). In *Muller,* the validity of an Oregon law limiting the hours of labor of females was attacked on constitutional grounds. The constitutionality of the statute was sustained.

---

[3]The California maximum hours for women statute has been amended to add a few additional types of employments. Stats. 1939, c. 1072, p. 2297, § 1 and in 1967 as noted in the text of this opinion. However, it is derived from and is substantially the same as its statutory antecedent challenged in *Miller v. Wilson, supra.* Stats. 1911, c. 258, p. 437, § 1.

The decision was based upon considerations relating to woman's physical structure, her maternal functions, and the vital importance of her protection in order to preserve the strength and vigor of the race. "She is properly placed in a class by herself," the court stated (28 S.Ct. at 326-327), "and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. . . . Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him [man], it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the struggle for subsistence. This difference justifies a difference in legislation." . . .

Suffice it to say that the Supreme Court has passed upon and rejected the contention that state maximum hours for women laws violate the Equal Protection Clause. The restriction on working hours which such statutes impose on women, as a special class, has been held to be a reasonable one. *Muller v. Oregon*, followed in *Miller v. Wilson*, is still the law as declared by the Supreme Court. There have been no intervening decisions of the court in cases which are closely analagous which would lead to the conclusion that the basic rationale of these cases has been discarded or even seriously eroded.

But plaintiffs contend that times have changed and so should the law.

These decisions were handed down nearly sixty years ago. The *Muller-Miller* rationale was based on medical data available at that time.[4] There are notions expressed in the opinions which may no longer be viable in view of the role of women in today's society. In *Muller*, the Supreme Court stated (28 S.Ct. at 326):

> ". . . History disclosed the fact that woman has always been dependent upon man."

What seemed so clear to the court in 1908 is not so clear in light of contemporary American society. In view of the increased percentage of women in the work force and as heads of households, the absolute dependency of woman on man, so obvious in the 19th century, is not so apparent today. Since the time of the *Muller* decision, women have obtained the right to vote. (The 19th Amendment became effective on August 26, 1920.)

In general, women have achieved a larger degree of contractual, personal and political rights equal with men. Nearly all of woman's civil disabilities have been removed. In the 19th century she was viewed as physically, socially and economically inferior to man. The laws buttressed this view. In the eyes of the law today, she is man's equal and to be accorded the same rights and privileges as her male counterpart.

It is argued that women's maternal function is less time-consuming than it was at the turn of the century. The average woman has fewer children today. (The average American family has less than two children—approximately

---

[4] It was in *Muller vs. Oregon* that Louis Brandeis, representing the State of Oregon, submitted his famed brief containing medical and socio-economic data tending to establish the reasonableness of the state's classification by sex to protect the female of the human species. In *Muller*, the court took into account medical opinions of the day to the effect that long hours were injurious to the health of females and adversely affected their procreative functions.

1.7 children per family.) There is a far greater number of women working today. (Women comprise 30% of the nation's work force.) A substantial number of women are heads of households.

In addition, it is argued that the economic conditions giving rise to the maximum hours legislation no longer prevail or, to the extent that they still exist, they can be regulated by premium pay for overtime laws which do not distinguish as to sex. In sum, the plaintiffs are contending that maximum hours for women laws are unreasonable in light of the changes in the conditions and functions of women in today's society.

On the other hand, this may depend upon the character of the employment. The classification of women as a group needing some particular protection of the law may still be reasonable for many purposes. It has also been pointed out that the abandonment of limitations on working hours for women would place women on an equal basis with men in the matter of overtime pay, but at the same time would also make them subject to the obligation to perform as much overtime work as required of men. This is a mixed blessing. It is not a matter of letting women earn overtime when they want to, but an obligation to work overtime whether they want to or not on pain of being discharged. This could result in women being squeezed out of certain industrial work rather than broadening the employment base and opportunity for women in industry. It is not so certain as plaintiffs assume that their position represents the will of many other women, even if similarly situated.

Plaintiffs have not distinguished the issue presented from the one presented in *Muller v. Oregon, supra.* The principle of *stare decisis* must ultimately control the decision at the district court level. A Supreme Court decision is as binding as statutory law. The district court, even sitting as a three-judge tribunal, cannot reverse the Supreme Court. When the law has developed through intervening decisions to the

point that it has become clear that the Supreme Court has abandoned the reasoning which gave rise to an earlier decision and that the law has in fact changed and all that is needed is recognition, then an inferior court should recognize what is obvious and act accordingly. However, there has been no line of decisions which cast doubt upon the basic holding of *Muller*. Therefore, this case does not present a substantial constitutional issue. Mere speculation as to what the Supreme Court might do in the light of the changed circumstances will not suffice to take this issue out of the insubstantial category.

B. *Supremacy Clause: Federal-State Statutory Conflict*

Plaintiffs contend that, if section 1350 does not violate the Equal Protection Clause, it is nevertheless invalid in that it conflicts with a federal statute, viz.; Title VII of the 1964 Civil Rights Act. It is a well-established axiom of constitutional law that the Supremacy Clause operates to invalidate a state law in conflict with (or in an area preempted by) a valid federal law. *Gibbons v. Ogden*, 9 Wheat 1 (1820); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). In this sense, the claimed invalidity of a state law conflicting with a federal law is premised on a provision of the Constitution.

Nevertheless, the Supreme Court has held that the three-judge court requirement of 28 U.S.C. § 2281 applies only to actions which rely upon substantive provisions of the Constitution, e.g., the First Amendment, the Due Process or Equal Protection Clauses, the Commerce Clause, etc., to support the claimed invalidity of the state statute. (As discussed above, a substantial issue must be raised with respect to the constitutionality of the state law under a substantive constitutional provision.) But 28 U.S.C. § 2281 does not apply to Supremacy Clause issues involving, as they do, only a federal-state statutory conflict. *Swift & Co. v. Wickham*, 382 U.S. 111 (1965).

In *Swift*, the Supreme Court examined the legislative purpose in enacting the provisions conferring jurisdiction

on three-judge courts. 28 U.S.C. §§ 2281-2284. These provisions were designed to obtain a more responsible and authoritative tribunal for the litigation of suits attacking the constitutionality of a state law. By providing for direct review by the Supreme Court, 28 U.S.C. § 1253, a final determination on the merits is expedited.

However, the court observed that cases arising under the Supremacy Clause involved the construction of state and federal laws rather than an interpretation of a substantive provision of the Constitution. In essence, the constitutionality of the state law is not challenged. Under the *Swift* doctrine, there is no jurisdiction for a three-judge court where the claim of invalidity is grounded in the Supremacy Clause.

C. *Civil Rights Act of 1964*

Plaintiffs contend that they are entitled to invoke a three-judge court by virtue of a provision in Title VII of the Civil Rights Act. See 42 U.S.C. § 2000(e)-6(b). This provision confers jurisdiction upon the district courts over actions brought for a violation of Title VII. It also permits the Attorney General of the United States to request a three-judge court in an action where he certifies that the case is of general public importance. In the event the Attorney General does not file such a request, the action is to be heard and determined by a single judge.

It is obvious that only the Attorney General has the authority to invoke a three-judge court under this provision. The Attorney General has not seen fit to do so in this case. There is no provision in Title VII giving an individual litigant the right to have an action adjudicated by a three-judge court.

In sum, there is no jurisdiction for a three-judge court. Plaintiffs have failed to raise a substantial constitutional issue under the Equal Protection Clause. There is no jurisdiction for a three-judge court on a claim of invalidity grounded in the Supremacy Clause. Moreover, plaintiffs are

not entitled to invoke a three-judge court under any provision of the Civil Rights Act itself. A three-judge court is not appropriate in this case.

IT IS HEREBY ORDERED that defendants' motion to dissolve the three-judge court be and the same is hereby granted.

DATED: May 10, 1968.

/s/ Gilbert H. Jertberg
Circuit Judge

/s/ Albert Lee Stephens, Jr.
District Judge

/s/ William P. Gray
District Judge

[Filed May 10, 1968]

[Caption Omitted]

MEMORANDUM OF OPINION AND ORDER OF DISMISSAL

The three-judge court appointed in the above-captioned case having been dissolved by order which has been filed on this date, the case now reverts to the undersigned judge to whom the case was originally assigned. There is pending the defendants' motion to dismiss and this memorandum of opinion and order is addressed to the pending motion. The order dissolving the three-judge court is incorporated in this memorandum by reference.

DOCTRINE OF ABSTENTION

Defendants have moved the court to dismiss this case in its entirety by invoking the doctrine of abstention. Defendants ask the court, in the exercise of its equitable discretion, to abstain from adjudicating the merits of this action.

The avowed purpose of plaintiffs has been to obtain an adjudication by a three-judge court so that an appeal may then be taken directly to the Supreme Court, thus avoiding all intermediate appellate action which would be the normal course and which would defer consideration by the Supreme Court. While the attack is made upon the laws of California, plaintiffs' goal is in reality to obtain a ruling on constitutional grounds which as a precedent would dispose of limitations on working hours for women throughout the United States. There has been widespread interest in this action as is witnessed by the fact that the National Federation of Business and Professional Women's Clubs, Inc. and the National Organization for Women, a corporation, (both corporations headquartered in Washington, D.C.) have sought to file a brief, present evidence and argue the case as *amicus curiae* and the California Labor Federation, AFL-CIO, has sought to intervene. Divergent views on the merits are expressed by these would-be participants.

From what has already been said, plaintiffs' major objective of a direct and early appeal to the Supreme Court on the merits is not attainable because a three-judge court has been found to be inappropriate and has been dissolved. The court now turns to the motion to dismiss on the ground that the court should abstain from adjudicating the merits of this action.

As a general rule, the federal courts have no right to decline to exercise jurisdiction where it exists. *Cohens vs. Virginia,* 6 Wheat 264, 5 L. Ed. 257 (1821); *Wilcox vs. Consolidated Gas Co.,* 212 U.S. 19, 40 (1909). There is a line of authority, however, which recognizes the propriety of abstention by a federal court in a limited number of factual situations. Generally speaking, there are three situations in which abstention has been held proper. All of them involve a suit where state action is being challenged in federal court as contrary to the federal Constitution or laws. Abstention is proper:

(1) To avoid decision of a federal constitutional question where the case may be disposed of on questions of state law;

(2) To avoid needless conflict with the administration by a state of its own affairs, and;

(3) To leave to the states the resolution of unsettled questions of state law.

These various situations necessarily overlap at times, and their underlying purpose is the same, to wit, to obviate unnecessary friction in the federal system.

The leading case supporting abstention is *Railroad Commission of Texas vs. Pullman Co.*, 312 U.S. 496 (1941). In this case the Pullman Company was seeking to enjoin the enforcement of an order of the Texas Railroad Commission, claiming that the order denied its rights under the 14th Amendment and claiming also that under Texas law the Commission lacked authority to make the order in question. While a federal court has jurisdiction to decide an ancillary state issue, the Supreme Court ordered the district court to abstain from deciding the case, but to retain jurisdiction until the parties had an opportunity to obtain a state court decision on the state issues involved. In this way the state court decides the state issue and the federal court avoids deciding a federal constitutional issue prematurely or unnecessarily, since if the state court should hold the order unauthorized as a matter of state law, there is no need for the federal court to pass on the federal question.

It has also been held that abstention is appropriate where the issue involves a specialized aspect of a complicated state regulatory law. *Burford vs. Sun Oil Co.*, 319 U.S. 315 (1943). In general, where there is adequate administrative and judicial review of state administrative action or orders, plaintiffs will not be allowed to short-circuit this process by bringing a federal action if bypassing of state administrative remedies would be disruptive to the state regulatory scheme. In the above case the Supreme Court held that the federal

court may abstain and dismiss the action. Again, where the state law in question is doubtful or unconstrued by the state court, abstention may be proper. *Louisiana Power & Light Co. vs. City of Thibodaux*, 360 U.S. 25 (1959).

It is clear, however, that abstention should not be ordered where the relevant state law is unambiguous or settled [*Davis vs. Mann*, 377 U.S. 678 (1963); *Public Utilities Commission of State of Calif. vs. United States*, 355 U.S. 534 (1958)], or where the state statute would be invalid no matter how it may be construed by the state courts. *Harman vs. Forsenius*, 380 U.S. 528 (1965); *Turner vs. City of Memphis*, 369 U.S. 350 (1962).

As appears from the discussion in the order dissolving the three-judge court, the federal constitutional questions relative to the California law are settled. It is proper to legislate concerning women as a class when this is in the interest of the public health and welfare. A law reasonably directed toward the preservation of the public health and welfare is not unconstitutional even though reasonable men may differ in opinion as to whether it will or will not accomplish the purpose.

The California law was re-examined by the legislature in 1967, quite obviously with applicable federal laws being given consideration. Specific reference is made in California Labor Code § 1350.5 to Section 13 of the Fair Labor Standards Act, as amended through February 1, 1967. There is no reason to think that the Civil Rights Act of 1964 was not also carefully considered. The legislature enlarged the working hours of women who are covered by the Fair Labor Standards Act from eight hours to ten hours. (Calif. Labor Code § 1350.5) Plaintiffs in this action are covered by the Fair Labor Standards Act and, therefore, have had their working hours enlarged. This is at least a step in the direction they want the law to take. The legislature also added a savings clause. (Calif. Labor Code § 1357.)

There is nothing about these recent changes in the California law which renders inapplicable the judicial pronounce-

ments that the legislative purpose is to protect the public health and welfare by restricting the hours of labor for women in certain occupations. Reasonable men still may differ on the subject, but the federal court is still bound by *The Matter of Application of Miller*, 162 Cal. 687, 124 P. 427 (1912).

The Supremacy Clause of the United States Constitution dictates that a federal statute will prevail over a state statute when the two are directly in conflict. Plaintiffs claim that the California Labor Code's restrictions upon the working hours of women is in direct conflict with the federal statute. The federal statute is quite clear on its face. It provides that among people employed in interstate commerce there shall be no discrimination in employment because of sex. This means that women should neither be favored nor handicapped because of sex. However, if there is a rational basis dependent upon other factors for treating women differently than men, then this is not a discrimination because of sex. In *Ward vs. Firestone Tire and Rubber Co.*, 260 F. Supp. 579 (1966) it was held that a man who was refused a transfer to a job earmarked as "light work," and open only to women and men who had physical defects, was not discriminated against and that the restriction on eligibility for the job had a bona fide relation to occupational qualification. California Labor Code §§ 1250 to 1253, inclusive, protect women (but not men) when required to move heavy objects, prohibit women from lifting more than 50 pounds or carrying up or down stairs an object weighing more than 10 pounds. These provisions have not been challenged.

Title 42 U.S.C. § 2000h-4 provides that Congress does not intend to occupy the field of civil rights to the exclusion of state laws on the same subject matter and that state laws which are not inconsistent with the purposes of express provisions of the federal Civil Rights Act are not invalidated. The purpose of the Civil Rights Act, as it applies to discrimination because of sex, is to eliminate the frictions, tensions

and financial inequities of discrimination on the basis of sex all for the purpose of benefiting and improving the free flow of commerce between the states. The purpose of the California restriction upon the working hours of women is not by any means as apparent.

As a result of the 1967 amendment which added § 1350.5 to the Labor Code, California restricts the hours of women who are laboring in interstate commerce to ten hours per day, while apparently restricting other women laboring at the same job to eight hours per day. This is a discrimination between one woman and another of which the plaintiffs cannot complain since they are the beneficiaries of longer hours which is in accord with their desires, nor is this a federal-state conflict. However, it makes suspect the true present purpose of the limitation of working hours for women. Are these restrictions truly based upon a concern for the public health and welfare, a determination to restrict the number of women in industry in favor of male employees or to protect women against the competition of men? It is an anomaly that the federal court should first be asked to pass upon an alleged conflict between state and federal law when the issues focus upon the state law.

Issues of state constitutional law are involved. Those constitutional issues treated in *The Matter of Application of Miller, supra,* are involved and a good case can be made for a re-examination. Turning to the California Constitution, Article 1 § 11 provides, "All laws of a general nature shall have uniform operation." This was dismissed in 1912, but then the law provided a uniform eight hour day for all women subject to a limitation on their working hours. Article 1 § 1 still provides, "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property, and preserving and obtaining safety and happiness." Article 20 § 18 provides, "No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation

or profession." These constitutional provisions are unmistakably in the field of civil rights and do not conflict with the Civil Rights Act of 1964.

On the surface, at least, it would seem that if the state law in question is in conflict with the Civil Rights Act of 1964, it would also conflict with these provisions of the California Constitution. The state courts themselves have greater freedom in examining and re-examining state laws. Furthermore, they have greater flexibility in resolving the potential problems, especially since they are in a position to interpret and apply the provisions of the state Constitution as well as the Constitution and laws of the United States. The savings clause, California Labor Code § 1357, would further suggest that it would be advisable for the issues of this case to be presented to the state courts which could consider, among other things, whether such a clause can compel piecemeal litigation of the basic issue.

The importance of the questions which are raised by a threat to the validity of laws affecting working women as a class from the standpoint of the orderly administration of the law by the state is enormous. There is no serious problem of interpretation or construction of the federal law which can as easily be applied by state as federal courts, but there are serious problems of interpretation and construction of the state law. The considerations which have traditionally moved the federal courts to abstain from decision in deference to the state courts are all present in the circumstances of this case. The case may be disposed of on questions of state law and federal constitutional questions (if they exist) may be avoided. Needless conflict with the administration by the state of its own affairs may be avoided and this course leaves to the state the resolution of unsettled questions of state law, including both the issues which might be adjudicated in the federal court and others which are purely of state concern.

For the foregoing reasons it is proper that judgment should be entered dismissing this action without prejudice. Defend-

ants' motion to dismiss is granted and IT IS ORDERED that the within action be and it is hereby dismissed. This order of dismissal disposes of all matters pending in this case.

DATED: May 10, 1968.

/s/ Albert Lee Stephens, Jr.
United States District Judge

APPENDIX B

STATUTES INVOLVED

Section 1350 of the California Labor Code provides:

> No female shall be employed in any manufacturing, mechanical, or mercantile establishment or industry, laundry, cleaning, dyeing, or cleaning and dyeing establishment, hotel, public lodginghouse, apartment house, hospital, beauty shop, barbershop, place of amusement, restaurant, cafeteria, telegraph or telephone establishment or office, in the operation of elevators in office buildings, or by any express or transportation company in this state, more than eight hours during any one day of 24 hours or more than 48 hours in one week, *except as provided in Section 1350.5*.

The italicized portion and a special savings provision were added in 1967 after the institution of this action. The exception section 1350.5 provides:

> (a) Employers of employees covered under the provisions of the Fair Labor Standards Act may employ females up to 10 hours during any one day of 24 hours or up to 58 hours in one week, provided that they are compensated at the rate of 1½ times the regular rate of pay for time worked for one employer in excess of eight hours in any one day or 40 hours in any one week.
>
> (b) The provisions of subdivision (a) shall not apply to: (1) employers whose employees are exempted in Section 13 of the Fair Labor Standards Act, as amended through February 1, 1967, from the provisions of Section 7 of the Fair Labor Standards Act; (2) employers whose employees are exempted in Section 7 of the Fair Labor Standards Act, as amended through February 1, 1967, from the provisions of Section 7 of the Fair Labor Standards Act, if the employees are not entitled under such exemptions in Section 7 to 1½ times their regular rate of pay until they have worked more than 48 hours in

one week; and (3) employers whose employees are engaged in the laundering, cleaning, or repairing of clothing, or in the clothing manufacturing industries.

(c) The provisions of subdivisions (a) and (b) of this section shall not affect or change the provision of any existing collective bargaining agreement.

(d) Notwithstanding the provisions of subdivision (b) of this section, the provisions of subdivision (a) of this section shall apply to the employment of females by airlines certificated by the federal or state government.

The special savings provision (section 1357) provides:

If any clause, sentence, paragraph, or part of this article, or the application thereof to any person or circumstance, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this article and the application thereof to other persons or circumstances, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstances involved.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Discrimination Because of Race, Color, Religion, Sex, or National Origin

Sec. 703. (a) It shall be an unlawful employment practice for an employer–

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive

any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

Prevention of Unlawful Employment Practices

* * *

Sec. 706. * * * (f) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the plaintiff would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the persons discriminated against shall operate to reduce the back

pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

* * *

Effect of State Laws

Sec. 708. Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 5 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968
No. 375—~~Miscellaneous~~

VELMA L. MENGELKOCH, *et al.*,

Appellant,

vs.

INDUSTRIAL WELFARE COMMISSION, and NORTH AMERICAN AVIATION, INC.,

Appellees.

Motions to Affirm Order of Three-Judge Court and to Dismiss Appeal From Order of One-Judge District Court, With Points and Authorities in Support Thereof.

THOMAS C. LYNCH,
Attorney General of California,
EDWARD M. BELASCO,
Deputy Attorney General,
JAY L. LINDERMAN,
Deputy Attorney General,
WILLIAM L. ZESSAR,
Deputy Attorney General,
600 State Building,
217 West First Street,
Los Angeles, Calif. 90012,
(213) 620-3239,
Attorneys for Appellee Industrial Welfare Commission.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

Page

Motions to Affirm Order of Three-Judge Court and to Dismiss Appeal From Order of One-Judge District Court, With Points and Authorities in Support Thereof 1

A. The Issues Raised by the Appeal From the Order of the Three-Judge Court Are Not Substantial and Therefore Further Review by This Court Is Not Necessary 2

B. This Court Does Not Have Jurisdiction to Entertain a Direct Appeal From a One-Judge District Court 2

Points and Authorities in Support of Motions 3

Introduction 3

Argument 5

I.

The Issues Raised by the Appeal From the Order of the Three-Judge Court Are Not Substantial and Therefore Further Review by This Court Is Not Necessary 5

A. To Invoke the Jurisdiction of a Three-Judge Court, a Substantial Constitutional Question Must Be Involved; Such a Question Is Not Involved Where as in the Case at Bar Constitutionality Has Previously Been Upheld by the United States Supreme Court 5

B. The Provision Setting Maximum Working Hours for Women Does Not Violate the Fourteenth Amendment of the United States Constitution 6

Page

C. A Three-Judge Court May Not Be Invoked Solely to Determine Whether the Supremacy Clause Makes a State Statute Unconstitutional 7

II.

The United States Supreme Court Does Not Have Jurisdiction to Entertain a Direct Appeal From an Order of a One-Judge District Court; Therefore the Appeal From That Order Should Be Dismissed 8

Conclusion 9

TABLE OF AUTHORITIES CITED

Cases	Page
California Water Service Co. v. City of Redding, 304 U.S. 252	5
German v. South Carolina State Ports Authority, 295 F. 2d 491	5
Hoyt v. Florida, 368 U.S. 57	6, 7
Miller v. Wilson, 236 U.S. 373	5, 6
Morey v. Doud, 354 U.S. 457	7
Muller v. Oregon, 208 U.S. 412	5, 6
Stuart v. Wilson, 282 F. 2d 539	8
Swift & Co. v. Wickham, 382 U.S. 111	7
United States v. Darby, 312 U.S. 100	6
West Coast Hotel Co. v. Parrish, 300 U.S. 379	6

Rules	
Rules of the Supreme Court, Rule 16(1)(a)	1
Rules of the Supreme Court, Rule 16(1)(b)	1

Statutes	
California Labor Code, Sec. 1350	3
United States Code, Title 28, Sec. 1253	8
United States Code, Title 28, Sec. 1291	8
United States Code, Title 28, Sec. 2281	3, 7
United States Code, Title 42, Sec. 2000(e)-7	3
United States Constitution, Fourteenth Amendment	2, 3, 7

IN THE

Supreme Court of the United States

October Term, 1967
No. 375—Miscellaneous

VELMA L. MENGELKOCH, *et al.*,

Appellant,

vs.

INDUSTRIAL WELFARE COMMISSION, and NORTH AMERICAN AVIATION, INC.,

Appellees.

Motions to Affirm Order of Three-Judge Court and to Dismiss Appeal From Order of One-Judge District Court, With Points and Authorities in Support Thereof.

Appellee Industrial Welfare Commission of the State of California[1] pursuant to Supreme Court Rule 16(1) (a) and (c), moves to affirm the order of the United States District Court, Central District of California, dated May 10, 1968, sitting as a three-judge court and to dismiss the appeal from the order of the one-judge

[1]The Division of Industrial Welfare of the State of California also was sued as a defendant in the action below. However, this appeal has not been taken against the Division, and accordingly, this motion is made only on behalf of the remaining state-agency appellee, the Industrial Welfare Commission of the State of California.

district court of that district dated May 10, 1968, on the following grounds:

A. The Issues Raised by the Appeal From the Order of the Three-Judge Court Are Not Substantial and Therefore Further Review by This Court Is Not Necessary.

1. The jurisdiction of a three-judge court will not be invoked unless a substantial constitutional question is involved; such a question was not involved in the case at bar since the constitutionality of statutes limiting the working hours of women has previously been upheld by this Court.

2. A provision setting maximum working hours for women does not violate the Fourteenth Amendment to the United States Constitution.

3. A three-judge court may not be invoked solely to determine whether the Supremacy Clause makes a state statute unconstitutional.

B. This Court Does Not Have Jurisdiction to Entertain a Direct Appeal From a One-Judge District Court.

These motions are based upon this document, the points and authorities attached hereto and the transmitted record in this case.

THOMAS C. LYNCH,
Attorney General of California,
EDWARD M. BELASCO,
Deputy Attorney General,
JAY L. LINDERMAN,
Deputy Attorney General,
WILLIAM L. ZESSAR,
Deputy Attorney General,
Attorneys for Appellee Industrial Welfare Commission.

POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS.

Introduction.

Appellant Velma L. Mengelkoch sued to have section 1350[2] of the California Labor Code providing for maximum working hours for women declared unconstitutional as violating the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, or being invalid as conflicting with Title VII of the Civil Rights Act of 1964 [42 U.S.C. §2000(e)-7]. Appellant, suing in her own behalf and purportedly in behalf of all similarly situated women in the State of California, sought to enjoin appellee Industrial Welfare Commission and its then co-defendant the Division of Industrial Welfare of the State of California from enforcing section 1350 of the California Labor Code and to enjoin North American Aviation, Inc., from further violations of Title VII of the Civil Rights Act.

After appellant invoked a three-judge court pursuant to 28 U.S.C. section 2281, appellee Industrial Welfare

---

[2]California Labor Code section 1350 provides in part:

"No female shall be employed in any manufacturing, mechanical, or mercantile establishment or industry, laundry, cleaning, dyeing, or cleaning and dyeing establishment, hotel, public lodginghouse, apartment house, hospital, beauty shop, barbershop, place of amusement, restaurant, cafeteria, telegraph or telephone establishment or office, in the operation of elevators in office buildings, or by any express or transportation company in this state, more than eight hours during any one day of 24 hours or more than 48 hours in one week. . . ."

Commission and its then codefendant the Division of Industrial Welfare challenged the jurisdiction of both the three-judge court and the one-judge district court and moved to dismiss the action. The three-judge court granted the motion and ordered itself dissolved on the grounds that:

1. The complaint failed to raise a substantial constitutional question in that the United States Supreme Court had previously held that it was not a denial of equal protection for a state to set maximum hours of work for women.

2. The contention that the provision setting maximum working hours for women conflicts with a federal statute, namely Title VII of the 1964 Civil Rights Act, cannot be urged as a basis for invoking the jurisdiction of a three-judge court.

After the three-judge court ordered itself dissolved, the one-judge district court ordered the action dismissed on the ground of equitable abstention.

ARGUMENT.

I.

The Issues Raised by the Appeal From the Order of the Three-Judge Court Are Not Substantial and Therefore Further Review by This Court Is Not Necessary.

A. To Invoke the Jurisdiction of a Three-Judge Court, a Substantial Constitutional Question Must Be Involved; Such a Question Is Not Involved Where as in the Case at Bar Constitutionality Has Previously Been Upheld by the United States Supreme Court.

A three-judge court may be invoked only to hear a substantial constitutional question, but it will not hear a matter in which previous decisions of the United States Supreme Court have foreclosed the subject. *California Water Service Co. v. City of Redding,* 304 U.S. 252, 255 (1938); *German v. South Carolina State Ports Authority,* 295 F.2d 491 (4th Cir. 1961).

This Court has previously ruled upon the issue sought to be relitigated in the matter at bar in *Miller v. Wilson,* 236 U.S. 373 (1915) by holding that the California statute setting maximum hours for women was constitutional and did not violate the equal protection provision. A similar statute was sustained in *Muller v. Oregon,* 208 U.S. 412 (1908).

The three-judge procedure is extraordinary and imposes a heavy burden on the federal courts, resulting in expense and delay. The procedure is one that should not be lightly extended. Restrictions on appellate review in the Supreme Court would be impaired were groundless allegations sufficient to enable a plaintiff to litigate his claim before a three-judge court. *California Water Service Co. v. City of Redding,* 304 U.S.

252 (1938). The result of this Court's prior determinations is that the instant matter does not pose a substantial constitutional question, and the order of the three-judge court was correct and should be affirmed. Affirmance will result in a more orderly determination of the issue by requiring appellant to litigate her case before the district judge sitting alone and then pursue her right of appeal to the Court of Appeals and then to this Court.

B. The Provision Setting Maximum Working Hours for Women Does Not Violate the Fourteenth Amendment to the United States Constitution.

Statutes limiting the working hours of women have been upheld as reasonable because women need sufficient time to discharge their maternal functions, for the rearing and education of children and maintenance of the home. *Miller v. Wilson,* 236 U.S. 373, 381; *Muller v. Oregon,* 208 U.S. 413, 420 n. (1908).

The passage of time has not dimmed the validity of this Court's reasoning in *Miller* and *Muller, supra.* Years later both decisions were cited with approval in *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 394-395, 400 (1937). In *United States v. Darby,* 312 U.S. 100, 125 (1941) citing the *Muller* decision this Court stated: ". . . Nor is it any longer open to question that it is within the legislative power to fix maximum hours. . . ."

More recently this Court in *Hoyt v. Florida,* 368 U.S. 57 (1961) again recognized that women need

time to properly fulfill their role in the home by upholding a state statute providing that women could not be required to perform jury duty. Importantly that decision stated:

> ". . . Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. . . ." (at pp. 61-62.)

The statute in *Hoyt* and provisions limiting working hours for women are similar for both insulate women from time consuming tasks which would take them away from the home thereby preventing the performance of their family duties. A statutory classification having some reasonable basis is not unconstitutional under the Fourteenth Amendment. *Morey v. Doud,* 354 U.S. 457, 463 (1957).

C. A Three-Judge Court May Not Be Invoked Solely to Determine Whether the Supremacy Clause Makes a State Statute Unconstitutional.

The jurisdiction of a three-judge court pursuant to 28 U.S.C. section 2281 applies only to actions which rely upon a substantive provision of the United States Constitution such as due process or equal protection. A three-judge court does not have jurisdiction solely to determine if the Supremacy Clause makes invalid a state statute since the determination of that question involves only a federal-state statutory conflict. *Swift & Co. v. Wickham,* 382 U.S. 111 (1965).

Beyond the application of the Fourteenth Amendment, the instant case involves only the question of

whether California's maximum work law for women conflicts with Title VII of the Civil Rights Act of 1964. That being the case the three-judge court properly held that it was without jurisdiction to determine that issue.

II.

The United States Supreme Court Does Not Have Jurisdiction to Entertain a Direct Appeal From an Order of a One-Judge District Court; Therefore the Appeal From That Order Should Be Dismissed.

Appellant improperly seeks to invoke the jurisdiction of this Court to appeal an order of the one-judge District Court dismissing the instant action on the ground of equitable abstention. The threshold question that must be resolved is whether or not the order is directly appealable to this Court. Appellee contends that it is not.

While this Court has jurisdiction to hear a direct appeal from a decision of a three-judge court, it has no jurisdiction to hear a direct appeal from a one-judge District Court. Such jurisdiction is lodged in the Courts of Appeal. 28 U.S.C. §§ 1291, 1253. See *Stuart v. Wilson,* 282 F.2d 539, 541-42 (5th Cir. 1960). Indeed appellant has recognized this principle by filing Notice of Appeal to the Court of Appeals, Ninth Circuit. (Jurisdictional Statement, p. 3. n. 2; Transmitted Record p. 107.)

Therefore the attempted appeal from the decision of the one-judge District Court should be dismissed.

Conclusion.

For the foregoing reasons, appellee respectfully requests that its motions to affirm the order of the three-judge district court and to dismiss the appeal from the order of the one-judge district court be granted.

Respectfully submitted,

THOMAS C. LYNCH,
Attorney General of California,

EDWARD M. BELASCO,
Deputy Attorney General,

JAY L. LINDERMAN,
Deputy Attorney General,

WILLIAM L. ZESSAR,
Deputy Attorney General,

Attorneys for Appellee Industrial Welfare Commission.

LIBRARY
SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

Office-Supreme Court, U.S.
FILED
NOV 22 1968
JOHN F. DAVIS, CLERK

No. 375

VELMA L. MENGELKOCH, MARY FAZZIO, and DEA C. KASKELA, as citizens of the United States and of the State of California, on their own behalf and on behalf of all other citizens of the State of California similarly situated,

APPELLANTS

v.

INDUSTRIAL WELFARE COMMISSION, and NORTH AMERICAN AVIATION, INC., a corporation,

APPELLEES

PETITION FOR REHEARING

Sylvia S. Ellison
9920 Cherry Tree Lane
Silver Spring, Maryland 20901

Attorney for Appellant,
Velma L. Mengelkoch

Washington, D. C. · THIEL PRESS · 202 · 393-0625

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 375

VELMA L. MENGELKOCH, MARY FAZZIO, and DEA C. KASKELA, as citizens of the United States and of the State of California, on their own behalf and on behalf of all other citizens of the State of California similarly situated,

APPELLANTS

v.

INDUSTRIAL WELFARE COMMISSION, and NORTH AMERICAN AVIATION, INC., a corporation,

APPELLEES

PETITION FOR REHEARING

Appellant Velma L. Mengelkoch petitions this Court to grant rehearing of its per curiam decision of October 28, 1968, vacating the order of the three-judge court and remanding this case to the District Court so that a timely appeal may be taken to the Court of Appeals. For grounds, appellant states:

1. On October 4, 1968, a three-judge court, duly constituted in *Ward v. Luttrell*, 69 LRRM 2593 (E.D. La.),[1] followed the lead of the three-judge court below and concluded that plaintiffs' charge that Louisiana's "Jane Crow" statutes

---

[1]The three-judge opinion in *Ward* in the Appendix, *infra*.

were discriminatory and violative of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, did not present a substantial constitutional question, even though neither this Court nor the Supreme Court of Louisiana had passed upon the constitutionality of the challenged statutes. The three-judge court in *Ward*, noted that "[s]ociological and economic changes * * * have occurred since the early 20th century decisions" of this Court in *Miller v. Wilson*, 236 U.S. 373, and *Muller v. Oregon*, 208 U.S. 412, but it, like the three-judge court below, was unable to discern the distinctions in those cases, which were pointed out in appellant's Jurisdictional Statement, pp. 10-11, and in her brief below (pp. 21-23), which is in the record before this Court (R. 61-63). Therefore, the three-judge court in *Ward* concluded that those decisions must control until this Court makes clear that it has abandoned the 19th century notions that women are "socially and economically inferior to men" and repudiates the dicta in those decisions approving discriminatory treatment of women. The court in *Ward* pointed out that "The opportunity to do so may be presented in the appeal in *Mengelkoch v. Industrial Welfare Commission.*".

Appellant urges the Court to take "the opportunity" which this appeal affords and make clear that it has abandoned the 19th century notion that women are "socially and economically inferior to men." Not to do so is to deny the basic constitutional right to earn a living to all women of all races for many years to come and to make a mockery out of the three-judge statutes.

As this Court pointed out in *Swift & Co. v. Wickham*, 382 U.S. 111, 124, "The purpose of the three-judge scheme was in major part to expedite important litigation; it should not be interpreted in such a way that litigation * * * is delayed while the proper composition of the tribunal is litigated." The instant case is important. No one—not even appellee—would deny this. Not only that, but the complaint was filed over two years ago in October, 1966, and the

three-judge court, which was convened to hear the constitutional issues, deliberated for more than a year before it decided to "dissolve" itself. Review by this Court, we submit, is thus plainly indicated.

2. *Wilson v. City of Port Lavaca*, 391 U.S. 352, cited by the Court as supporting its action in the instant case, is clearly distinguishable. The plaintiff there—an unhappy taxpayer—sought to restrain local municipal authorities from *invoking* a statute which provided that banks shall not be required to disclose amounts deposited by any depositor to third parties, except in certain circumstances. As the three-judge court pointed out, "neither of [the local parties] enforces or executes such statute. Indeed, there is no party defendant who does" (285 F. Supp. at 87). While plaintiff sought to rescue his case by pointing to his prayer for injunctive relief—that the City be restrained from enforcing its tax lien—the three-judge court pointed out, quite properly, that "no attack is made upon the constitutionality of the state statute authorizing the enforcement of the liens." Here, in sharp contrast, appellants seek to enjoin the California Industrial Welfare Commission from enforcing section 1350 of the California Labor Code on the ground that it is violative of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution because it discriminates against women in employment opportunities.

The instant case is thus one which requires a three-judge court, "not merely because a state statute is involved," but because "a state statute of general and statewide application is sought to be enjoined." *Moody v. Flowers*, 387 U.S. 97, 101, and cases there cited.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, probable jurisdiction be noted, inasmuch as this case involves substantial federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

SYLVIA S. ELLISON
9920 Cherry Tree Lane
Silver Spring, Maryland 20901

Attorney for Appellant,
Velma L. Mengelkoch

CERTIFICATE OF COUNSEL

I hereby certify that the petition for rehearing filed in this cause is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

Sylvia S. Ellison

APPENDIX

WARD v. LUTTRELL

U.S. District Court,
Eastern District of Louisiana

WARD, et al. v. LUTTRELL, etc. et al., No. 67-1622, October 4, 1968

STATE LAWS

—Louisiana maximum-hours laws — Discrimination against women — Federal Constitution — Civil Rights Act of 1964 — Jurisdiction of three-judge court ▶ 107.47

Three-judge federal district court does not have jurisdiction of injunction action alleging that Louisiana maximum-hours laws (SLL 28:302) applicable to women are discriminatory, violate Fourteenth Amendment to Federal Constitution and Civil Rights Act of 1964, since (1) U.S. Supreme Court has upheld constitutionality of similar statutes of other states; and (2) interpretation of issue of alleged conflict between state and federal statutes is not function for three-judge court—Ward v. Luttrell (DC ELa, 1968) 69:2593.

Injunction action to have Louisiana maximum-hours laws (SLL 28:302) declared void by three-judge federal district court. Three-judge statutory court is dissolved and case is returned to district court.

R. M. Mathews, for plaintiffs.

Jack P. F. Gremillion, Attorney General of Louisiana; William P. Schuler, Second Assistant Attorney General; John M. Currier, Assistant Attorney General; William P. Curry, Jr., Special Counsel, for defendants.

Before AINSWORTH, Circuit Judge, and BOYLE and RUBIN, District Judges.

Full Text of Opinion

BOYLE, District Judge: — This action is brought by fourteen women alleging that they are employed by Southern Bell Telephone and Telegraph Company and The Boeing Com-

pany at the Launch System Branch of the National Aeronautical and Space Administration's Michoud Assembly Facility in New Orleans, Louisiana.

Jurisdiction is invoked under 28 U.S.C. 1343(3) and (4) and The Civil Rights Act of 1964.

The defendants are the Commissioner of Labor of and the State of Louisiana, Department of Labor.[1]

Some of the plaintiffs are engineers,[2] doing engineering work, but classed as clerical employees. Others are "framemen" who route orders and the remainder are telephone operators.

For themselves, and all women workers in Louisiana, as a class, plaintiffs pray for injunctive relief on the ground that the Louisiana maximum work hour laws applicable to women[3] are discriminatory and violative of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution and, therefore, are null and void. They further urge that such labor laws are repugnant to the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(a) and 2000-h).[4]

---

1 The Commissioner and Department of Labor, through the Commissioner, are charged with the administration and enforcement of the Louisiana labor laws, rules and regulations. Louisiana Revised Statutes, Title 23, Section 1, et seq.

2 It does not appear whether the engineer plaintiffs are registered or not. See LRS 37:681 et seq.

3 Louisiana Revised Statutes, Title 23, Labor, Part IV. Female Persons, Sub-parts A through D.

4 42 U.S.C. 2000e-2(a)—It shall be an unlawfulful employment practice for an employer—

(1) to fail or refuse to hire, etc., "or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . sex. . . ."

(2) "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise affect his status as an employee, because of such individual's . . . sex. . . ."

42 U.S.C. 2000-h4—

"Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof."

Plaintiffs also pray for hearing of the matter by a Three-Judge Court, which has been duly constituted.

[DEFENSES RAISED]

The defendants have answered, urging, in addition to a general denial, the following defenses:

1. This is not a proper case for determination by a Three-Judge Court as provided by 28 U.S.C.A. 2281, inasmuch as many statutes similar to the ones here attacked have previously been held to be constitutional and, therefore, the constitutional attack upon these statutes is wholly insubstantial, legally speaking non-existing.

2. Plaintiffs fail to state a claim upon which relief can be granted, inasmuch as plaintiffs bring this suit as a class action on behalf of themselves and other women similarly situated in the State of Louisiana and, therefore, it is submitted that plaintiffs do not fully, properly and adequately represent the class with which they seek to be identified.

3. Plaintiffs fail to state a claim upon which relief can be granted, inasmuch as plaintiffs fail to state any act or practice of discrimination contemplated or intended to be covered by the Civil Rights Act of 1964.

4. The "female labor" statutes under attack are a valid exercise of the police powers of the State as reserved to it by the Tenth Amendment to the Constitution of the United States and relations between employer and employees are proper subjects for legislative regulations under the State police power to legislate for the general welfare.

Plaintiffs have also moved for an order maintaining their action as a class action under FRCP Rule 23.

We consider first whether this is a proper case for the Three-Judge Court which has been constituted.

The defendants urge that a Three-Judge Court is not required when the action presents an insubstantial claim of unconstitutionality, and contend that because the constitutionality of female labor statutes, on several occasions, has been sustained by the Supreme Court of the United States, the present action does not present a substantial constitutional question.

Indeed, a Three-Judge Court is not required where the constitutional issue is not a substantial one. Levering & Garrigues Co., et al, v. Morrin, et al, 289 U.S. 103, 53 S. Ct. 549, 77 L. Ed. 1062 (1933); Ex Parte Poresky, 290 U.S. 30. 54 S. Ct. 3, 78 L. Ed. 152 (1933); Swift & Company v. Wickham, 382 U.S. 111, 86 S. Ct. 258, 15 L. Ed. 2d 194 (1965). Lack of substantiality may appear either because it is obviously without merit or because its unsoundness results from previous decisions so as to foreclose the subject. California Water Service Co. v. City of Redding, 304 U.S. 252, 58 S. Ct. 865, 82 L. Ed. 1323 (1938); Levering & Garrigues Co., et al, v. Morrin, et al, supra; Ex Parte Poresky, supra; Swift & Company v. Wickham, supra; German v. South Carolina State Ports Authority, 295 F. 2d 491, 48 LRRM 3159 (4th Cir. 1961); Mengelkoch v. Industrial Welfare Commission, et al, 284 F. Supp. 950, 956, 69 LRRM 2537 (C.D. Cal. 1968)—(Appealed August 5, 1968—No. 375, Supreme Court—1968 Term).

The United States Supreme Court has not passed upon the constitutionality of the Louisiana female labor laws so far as we have been able to ascertain. Nor have we been able to discover any case in which the Louisiana Supreme Court has passed upon the question.

[PRIOR DECISIONS]

However, statutes of other States, prescribing maximum work hours for women, have been held constitutional in no less than five cases. California: Miller v. Wilson, 236 U.S. 373, 35 S.Ct. 342, 59 L. Ed. 628 (1915); Bosley v. McLaughlin, 236 U.S. 385, 35 S. Ct. 345, 59 L. Ed. 632 (1915); Massachusetts: Riley v. Massachusetts, 232 U.S. 671, 34 S. Ct. 469, 58 L. Ed. 788 (1914); New York: Radice v. New York, 264 U.S. 292, 44 S. Ct. 325, 68 L. Ed. 690 (1924); Oregon: Muller v. Oregon, 208 U.S. 412, 28 S. Ct. 324, 52 L. Ed. 551 (1908).[5]

[5] See also: Bunting v. Oregon, 243 U.S. 426, 37 S.Ct. 435, 61 L.Ed. 830 (1916), in which an Oregon statute relating to maximum work hours for males was held constitutional; West Coast Hotel Co. v. Parrish, 300 U.S. 379, 59 S.Ct. 578, 81 L.Ed. 703, 1 WH Cases 38 (1937), in which a State of Washington statute providing minimum wages for women was held constitutional.

Sociological and economic changes, which have occurred since the early 20th century decisions of the Supreme Court dealing with female labor laws, may be cited to dispel the 19th century notions that women, historically, have been dependent upon and are socially and economically inferior to men. Nevertheless, we find no distinction in the issue presented here and that presented in Muller v. Oregon, supra, and the other cases cited above. Those cases must control here until such time as the Supreme Court makes clear it has abandoned the reasoning giving rise to those earlier decisions and thus declares the law, in fact, changed.[6] The District Court, even when sitting as a Three-Judge Court, cannot reverse the Supreme Court.

The Fourteenth Amendment claims alleged in the complaint, we conclude, are too insubstantial to support the jurisdiction of a Three-Judge Court.

[CIVIL RIGHTS ACT]

The only remaining basis on which complainants seek to enjoin enforcement of the State statutes is their asserted repugnancy to the Civil Rights Act of 1964. This claim is, of course, grounded in the Supremacy Clause of the Constitution, which would require, if conflict be found between the State and Federal statutes, that the State enactments give way. The basic question involved in such claim is not one of interpretation of the Federal Constitution, but one of comparing two statutes. That function is not one for a Three-Judge Court. Swift & Company v. Wickham, supra.

Accordingly, the three-judge statutory Court is hereby dissolved and the case returned to Judge Edward J. Boyle, Sr., from whom the matter emanated, for further handling.

---

[6] The opportunity to do so may be presented in the appeal in Mengelkoch v. Industrial Welfare Commission, et al, supra.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

MENGELKOCH ET AL. *v.* INDUSTRIAL WELFARE COMMISSION AND NORTH AMERICAN AVIATION, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

No. 375. Decided October 28, 1968.

PER CURIAM.

A three-judge federal court, convened pursuant to 28 U. S. C. § 2281, determined that "there is no jurisdiction for a three-judge court," and entered an order dissolving itself. — F. Supp. —, —. The single district judge in whose court the case was originally filed considered further and dismissed the case without prejudice under the doctrine of abstention, stating in his memorandum opinion that "[t]he order dissolving the three-judge court is incorporated in this memorandum by reference." — F. Supp. —, —. Appellant appeals from both judgments. In these circumstances, we have no jurisdiction to entertain a direct appeal from the decision of the single judge; such jurisdiction is possessed only by the appropriate United States Court of Appeals. 28 U. S. C. § 1291. Moreover, we have held that when, as here, a three-judge court dissolves itself for want of jurisdiction, an appeal lies to the appropriate Court of Appeals and not to this Court. *Wilson* v. *Port Lavaca*, 391 U. S. 352.*

Although the appellants have lodged in the Court of Appeals for the Ninth Circuit a protective appeal from the decision of the single judge, it does not appear from the record that such an appeal has been filed with re-

*We think it makes no difference in principle that in *Wilson* v. *Port Lavaca* the single judge actually adopted the opinion of the three-judge court as his own.

spect to the three-judge order. Therefore, we vacate the order of the three-judge court and remand the case to the District Court so that a timely appeal may be taken to the Court of Appeals. See *Wilson* v. *Port Lavaca, supra; Utility Comm'n* v. *Pennsylvania R. Co.*, 382 U. S. 281, 282. The appeal from the decision of the single judge is dismissed for want of jurisdiction.

It is so ordered.